

1987

Projects Unlimited v. Pitcher : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870049

IN THE COURT OF APPEALS
OF THE STATE OF UTAH

PROJECTS UNLIMITED, INC.,
a Utah corporation,

Plaintiff/Respondent,

vs.

MAURICE R. PITCHER d/b/a
PITCHER PLUMBING,

Defendant/Appellant.

Case No. 870049-CA
Category No. 13 B

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT OF THE
FIFTH CIRCUIT COURT FOR SALT LAKE COUNTY,
SALT LAKE DEPARTMENT, STATE OF UTAH
HONORABLE MAURICE D. JONES PRESIDING

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COURT OF APPEALS

PROJECTS UNLIMITED, INC.,)	
a Utah corporation,)	
Plaintiff/Respondent,)	
vs.)	Case No. 870049-CA
)	Category No. 13 B
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)	

BRIEF OF RESPONDENT

STATEMENT OF JURISDICTION
AND NATURE OF PROCEEDINGS

This court has jurisdiction of this matter pursuant to *Utah Code Ann.* § 78-2a-3, in that it is an appeal from a circuit court judgment. This is an action for breach of contract, in which the circuit court granted summary judgment for plaintiff/respondent Projects Unlimited, Inc.

STATEMENT OF ISSUES

- I. Whether the trial court erred in granting summary judgment for plaintiff/respondent Projects Unlimited, Inc.
- II. Whether plaintiff/respondent Projects Unlimited, Inc. should be awarded its reasonable attorneys' fees incurred in connection with this appeal.

GOVERNING RULE OF CIVIL PROCEDURE

Rule 56 of the Utah Rules of Civil Procedure is determinative of this case. A copy of that rule is attached hereto as Addendum "A". Two pertinent portions of the rule are as follows:

Rule 56(c) -

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56(e) -

. . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

STATEMENT OF THE CASE

This is an action for breach of a contract to perform plumbing work. After being served with the complaint, defendant/appellant Maurice Pitcher ("Pitcher") filed a pro se answer. Plaintiff/respondent Projects Unlimited, Inc. ("Projects Unlimited") then moved for summary judgment, supporting its motion with two affidavits, one with respect to the contract, breach, and damages, and the other setting forth attorneys' fees incurred by Projects Unlimited. Pitcher did not file a counter-affidavit. The court granted summary judgment in favor of Projects Unlimited.

Facts

In July of 1985, Projects Unlimited, a contractor, entered into a subcontract with Pitcher, pursuant to which Pitcher was to perform the plumbing work on the

McKinley Elementary School in Box Elder County, Utah for which Projects Unlimited was general contractor (Affidavit of Philip Hofstetter, paragraph 2, Record at 21, hereinafter "Hofstetter Affidavit"). Pitcher completed most of the plumbing work for the project.

In April of 1986, Projects Unlimited sent a punch list to Pitcher for the McKinley Elementary job. The punch list included a number of items that Pitcher was to finish in order to complete his contract, including the purging of the drinking water system (Hofstetter Affidavit, paragraph 3, Record at 21). During the next several months, Projects Unlimited attempted on numerous occasions to contact Pitcher to request that he complete the items on the punch list, including purging of the drinking water system. Despite the many telephone calls and letters from Projects Unlimited, Pitcher refused to respond or to correct the problems existing with the drinking water system (Hofstetter Affidavit, paragraphs 3, 4, 5, Record at 21).

Because Pitcher refused to complete the work, and school was about to begin, Projects Unlimited was required to hire another plumbing contractor, Platt Brothers Plumbing, to complete the work. Projects Unlimited paid that plumbing contractor \$5,144.71 (Hofstetter Affidavit, paragraph 6, 7 Record at 21-22). Projects Unlimited then filed this action to collect from Pitcher the amount it was required to expend for completion of the work covered by the contract.

The complaint was filed on October 31, 1986. Pitcher filed a pro se answer dated November 13, 1986. The answer was not verified or sworn to in any manner. The answer admitted the contract between Projects Unlimited and Pitcher, but denied liability. The answer also contained the following statements:

1. I must draw to your attention that according to the proper notice must be given, it was not.

2. Power engineering [sic] of Salt Lake Mr Craig Hammond had a quote out to perform the very service for \$800.00. (Record at 5).

SUMMARY OF ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR PLAINTIFF/RESPONDENT.

A. The unsworn answer is not the equivalent of a counter-affidavit;

B. Even if Pitcher's answer were to be considered the equivalent of an affidavit, it does not raise any genuine issues of material fact precluding the entry of summary judgment; and

C. The trial court was not required to enter specific findings of fact or conclusions of law.

II. PLAINTIFF/RESPONDENT SHOULD BE AWARDED ITS REASONABLE ATTORNEYS' FEES INCURRED ON APPEAL.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR PLAINTIFF/RESPONDENT.

A. Pitcher's Unsworn Answer is not the Equivalent of a Counter-affidavit.

Rule 56 provides that summary judgment may be granted based on affidavits. When a motion for summary judgment is made and supported by affidavits, the adverse party may not rest upon the allegations of his pleadings, but his response must show that there is a genuine issue remaining for trial. Pitcher argues that his answer should be considered to be the equivalent of a counter-affidavit. As support for that proposition, he relies on *Pentecost v. M. W. Harward*, 699 P.2d 696 (Utah 1985). In that case, the court said:

A verified pleading, made under oath and meeting the requirements for affidavits established in Rule 56(e) of the Utah Rules of Civil Procedure, can be considered the equivalent of an affidavit for purposes of a motion for summary judgment.

699 P.2d at 698 (Citations omitted). Rule 56(e) requires that supporting and opposing affidavits be made on personal knowledge, set forth such facts as would be admissible evidence, and show affirmatively that the affiant is competent to testify to the matters set forth therein. Pitcher's pro se answer meets none of those requirements. In fact, it is difficult to determine from the pro se answer what Pitcher's defense to the complaint was meant to be. It is also difficult to determine whether the assertions set forth in the answer are supposedly made on personal knowledge. Even if all doubts are resolved in favor of Pitcher, the statements in his unverified answer do not meet the requirements of Rule 56(e).

In *Hall v. Fitzgerald*, 671 P.2d 224 (Utah 1983), the court held that ". . . allegations or denials in the pleadings are not a sufficient basis for opposing summary judgment." *Id.* at 226-7 (Citations omitted). Pitcher has cited no authority for the proposition that his unsworn answer can be considered to be equivalent to a counter-affidavit.

B. Even If Pitcher's Answer Were To Be Considered the Equivalent of a Counter-Affidavit, It Does Not Raise Any Genuine Issues of Material Fact Precluding the Entry of Summary Judgment.

As previously noted, in Pitcher's answer, he admits the existence of the contract. Apparently, he relies on two statements contained in the answer as defenses to Projects Unlimited's claims; the first statement appears to claim that Pitcher did not receive notice and the second, that the work could have been performed by another contractor for \$800.00. It is difficult to guess what legal

defense to Projects Unlimited's claim might be contained in those statements. The contract specifically provides that Pitcher will reimburse Projects Unlimited for damages or costs incurred by reason of Pitcher's failure to prosecute the work diligently (Section 4.6 of contract attached to Hofstetter Affidavit as Exhibit "A". Record at 26). The answer does not contradict the Hofstetter Affidavit which indicates that Projects Unlimited sent letters and made numerous telephone calls to Pitcher to attempt to persuade him to finish the work; nor does it indicate that Pitcher notified Projects Unlimited that he had arranged for someone else to perform the work. Thus, those statements in the answer do not raise a genuine issue of material fact.

C. The Trial Court Was Not Required To Enter Specific Findings of Fact or Conclusions of Law in Granting Summary Judgment for Plaintiff/Respondent.

In granting a motion for summary judgment, a trial court need not enter findings of fact or conclusions of law. *Mountain States Telephone and Telegraph Company v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258 (Utah 1984), Rule 52, Utah Rules of Civil Procedure. Rule 52(a) does provide that a court shall issue a brief written statement of the grounds for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

In the present case, the court did not enter findings of fact or conclusions of law. Instead, it simply entered an order noting that no counter-affidavit had been filed and granting the motion for summary judgment. It was not necessary for the court

to issue a brief written statement of the grounds for its motion since there was only one ground.

In his brief, Pitcher makes much of the fact that the court indicated in its order that Pitcher had not filed a counter-affidavit. This does not mean, however, that that was the sole basis for the granting of the motion. The Hofstetter Affidavit provided evidence of a contract, breach of the contract, and damages. The court had reviewed the file, in particular the Hofstetter Affidavit, prior to the hearing and had found that summary judgment was proper in the absence of any evidence contradicting the Hofstetter Affidavit. Thus, it was not necessary for the court to make a finding or a conclusion that there were no genuine issues of any material fact and that Projects Unlimited was entitled to judgment as a matter of law.

Pitcher did not object to the form of the order, nor has he offered any authority for the proposition that the court should have made findings or conclusions in order for the entry of summary judgment to have been proper. The pleadings clearly disclose that there were no genuine issues of material fact and that Projects Unlimited was entitled to judgment as a matter of law.

II. PLAINTIFF/RESPONDENT SHOULD BE AWARDED ITS
REASONABLE ATTORNEYS' FEES INCURRED IN
CONNECTION WITH THIS APPEAL.

The contract between Pitcher and Projects Unlimited provides that the subcontractor (Pitcher) is liable for attorneys' fees that Projects Unlimited incurs as a result of a breach of the contract by the subcontractor (Section 18.A of the contract attached to the Hofstetter Affidavit as Exhibit "A", Record at 31). The trial court awarded the attorneys' fees incurred by Projects Unlimited in prosecuting the action to the point of summary judgment.

In *Management Services Corp. v. Development Associates*, 617 P.2d 406 (Utah 1980), the court held that “. . . a provision for payment of attorney’s fees in a contract includes attorney’s fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract, . . .” *Id.* at 409. In this case, Projects Unlimited brought this action to enforce its contract with Pitcher. Thus, if the judgment in favor of Projects Unlimited is affirmed, the attorneys’ fees incurred by Projects Unlimited in this appeal should be awarded. This court should remand to the circuit court for a determination of reasonable attorneys’ fees to be granted to Projects Unlimited.

CONCLUSION

The trial court properly granted summary judgment for Projects Unlimited based on the uncontradicted affidavit of Hofstetter. Pitcher’s unsworn answer is not the equivalent of a counter-affidavit nor did it raise any real defenses to Projects Unlimited’s claim.

There is no basis, other than speculation, for Pitcher’s contention that the trial court granted the motion for summary judgment simply because Pitcher had not filed a counter-affidavit. The trial court was not required to make findings or conclusions or even to explain its decision. The record contains ample basis for the entry of summary judgment. Thus, the decision of the trial court should be affirmed and Projects Unlimited should be awarded its attorneys’ fees incurred in connection with this appeal.

DATED this 15th day of June, 1987.

Respectfully submitted,

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By Ellen Maycock
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed four true and correct copies of the foregoing BRIEF OF RESPONDENT to the following person, postage prepaid, this 15th day of June, 1987:

Mr. Kenlon W. Reeve
4185 Harrison Boulevard, Suite 320
Ogden, Utah 84401

Ellen Maycock
ELLEN MAYCOCK

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇌ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.